

No. 89-624

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Supreme Court, U.S.
F I L E D

IN THE

DEC 16 1989

Supreme Court of the United States

JOSEPH F. SPANIOL, JR.
CLERK

October Term, 1989

MAISLIN INDUSTRIES, U.S., INC., ET AL.,

Petitioners,

vs.

PRIMARY STEEL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

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**Counterstatement of Question
Presented for Review**

Whether the Interstate Commerce Commission, in exercising its primary jurisdiction under 49 U.S.C. §10701(a), may determine that it is an unreasonable practice for a motor carrier to collect higher charges from a shipper after negotiating the originally charged rate and representing to the shipper that the negotiated rate was properly published with the Interstate Commerce Commission, and whether such a determination by the Interstate Commerce Commission may be relied upon by a court.

Parties to the Proceeding Below

Appellants in the United States Court of Appeals for the Eighth Circuit, and Petitioners herein, are Maislin Industries, U.S., Inc., and its subsidiary operating companies, *viz.*, Gateway Transportation, Inc., Quinn Freight Lines, Inc., Richmond Cartage Corporation, MI Acquisition Corporation, and Maislin Transport of Delaware, Inc.

Appellee in the United States Court of Appeals for the Eighth Circuit, and Respondent herein, is Primary Steel, Inc.* The Interstate Commerce Commission was permitted to intervene as a party to the proceeding below in support of the Appellee.

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* The parent companies of Primary Steel, Inc. are: Intercontinental Affiliates & Partners; Golodetz Corporation; Golodetz Trading Corp.; and Primary Industries Corporation.

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PRIMARY STEEL, INC.,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

**BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI**

Respondent, Primary Steel, Inc., prays that the Petition For Writ Of Certiorari ("Petition") filed by the Petitioners, requesting the review of the judgment of the United States Court of Appeals for the Eighth Circuit, filed on July 17, 1989 in the proceeding styled *Maislin Industries, U.S., Inc., et al. v. Primary Steel, Inc.*, Docket No. 85-0021-CV-W-JWO, be denied in its entirety.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 879 F.2d 400 (8th Cir. 1989), and is reprinted as Appendix A to the Petition.

The memorandum and orders of the United States District Court for the Western District of Missouri, Western Division, granting summary judgment for the Respondent is reported at 705 F.Supp. 1401 (W.D. Mo. 1988), and is reprinted as Appendix B to the Petition.

The opinion of the Interstate Commerce Commission relied upon by the District Court and the Court of Appeals was served on January 19, 1988 at *Primary Steel, Inc. v. Maislin Industries, U.S., Inc., et al.*, Docket No. MC-C-10961. The opinion is unreported, and is reprinted as Appendix C to the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Statutes Involved

49 U.S.C. §10701 Standards For Rates, Classifications, Through Routes, Rules, And Practices

(a) A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable

49 U.S.C. §10761 Transportation Prohibited Without Tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device

Counterstatement of the Case

This proceeding was instituted on January 8, 1985 by the filing of a complaint with the United States District Court for the Western District of Missouri, Western Division, by Maislin Industries, U.S., Inc. ("Maislin"). Also named as plaintiffs in the complaint were Quinn Freight Lines, Inc. ("Quinn"); Gateway Transportation Co., Inc.; Richmond Cartage Corporation; and Maislin Transport of Delaware, Inc., each of which were divisions or subsidiaries of Maislin and were interstate common carriers of property under certificates issued by the Interstate Commerce Commission ("ICC"). Maislin and its divisions or subsidiaries are debtor and debtor-in-possession in Chapter 11 bankruptcy proceedings pending in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division.

The complaint alleged that Primary Steel, Inc. ("Primary") underpaid Maislin for 1,081 of Primary's shipments of steel products transported by Maislin's division or subsidiary, Quinn, during the period of January, 1981 through November, 1983, by the sum of \$187,923.36, plus interest and costs. Maislin's claim for undercharges was based on its contention that despite the fact that Primary had, prior to the bankruptcy, timely paid all charges billed to it at rates agreed upon by the parties, those rates were inapplicable under tariffs filed pursuant to 49 U.S.C. §10761(a). Thus, the claimed undercharges represented the difference between the rates negotiated by the parties and paid by Primary, and the tariff rates assessed by Maislin two or more years after the shipments took place.

On March 22, 1985, pursuant to 49 C.F.R. §1111.1, et seq., Primary instituted a formal complaint proceeding before the ICC at Docket No. MC-C-10961 alleging, inter

alia, that the rates sought to be applied to the 1,081 shipments by Maislin were unreasonable, unlawful and unjust, in violation of 49 U.S.C. §10701(a), and that Maislin's practice of assessing and rebilling higher rates than those originally quoted, confirmed and billed constituted an unreasonable, unlawful, unfair and deceptive practice in violation of 49 U.S.C. §10701(a).

Primary then filed a motion on April 2, 1985 with the District Court requesting that under the doctrine of "primary jurisdiction" the proceeding be referred to the ICC for a determination of the issues of the reasonableness and applicability of Maislin's tariffs, and the assessed freight rates and practices thereunder, at issue in the complaint. Maislin opposed the motion arguing that the equitable defenses raised by Primary were invalid as a matter of law, and referral to the ICC would serve no useful purpose.

The District Court, by order entered on September 3, 1985, granted Primary's motion and ordered that the issues and controversy raised in the complaint be referred to the ICC for determination. The referral was grounded on the application of the doctrine of primary jurisdiction, and the determination by the District Court that the reasonableness of Maislin's billing practice of assessing and rebilling higher rates than those originally quoted and billed was the particular type of controversy that should be resolved by the application of the ICC's special competence, expertise and administrative discretion.

The ICC served its decision on January 19, 1988, and relying on its earlier decision in *National Industrial Transportation League—Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ("*Negotiated Rates*"),

concluded that it would be an unreasonable practice under 49 U.S.C. §§10701(a) and 10761(a) to require Primary to pay the claimed undercharges. *Negotiated Rates* was a rulemaking proceeding wherein the ICC adopted a policy statement holding that, in the highly competitive environment following the passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, July 1, 1980, which amended the Interstate Commerce Act, 49 U.S.C. §10101, *et seq.*, under certain circumstances the filed rate doctrine does not prohibit the assertion of equitable defenses.

In applying *Negotiated Rates*, the ICC made extensive factual findings that Maislin's division or subsidiary, Quinn, over a continuing period of time offered Primary transportation at various quoted rates which Primary accepted; that Primary reasonably relied on Quinn to publish the quoted rates with the ICC pursuant to 49 U.S.C. §10761(a); that Quinn's failure to properly publish the quoted and agreed upon rates in tariffs, should under the circumstances, preclude Quinn's later collection of undercharges; that there was no evidence that Primary agreed to pay more than the amount Quinn originally quoted and billed for each shipment; that there was no evidence that Quinn even demanded additional amounts over the amounts billed at any time during the business relationship with Primary; that Primary reasonably believed that the amounts quoted and billed by Quinn were the correct total charges for the transportation services performed; and that the amounts were reached as the result of negotiation between the parties, and because full payment was made by Primary, Quinn was equitably entitled to collect no further charges from Primary. Because of its finding of an unreasonable practice in violation of 49 U.S.C. §10701(a), the ICC did not address the reasonableness of the rate levels.

Subsequently, Primary moved for summary judgment requesting that the District Court afford substantial deference to, and affirm, the ICC's decision. Maislin also moved for summary judgment contending that the ICC's decision was merely an advisory opinion and was contrary to law. The District Court, by memorandum and orders filed on July 22, 1988, granted summary judgment and conclusions of the District Court. In the opinion, the Court of Appeals determined that the collection of the undercharges would be an unreasonable and unlawful practice, were supported by substantial evidence and should be affirmed.

On August 19, 1988, Maislin filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. The ICC, upon motion, was permitted to intervene in support of Primary. Following the submission of briefs and oral argument, on July 17, 1989, the Court of Appeals issued an opinion affirming the judgment and conclusions of the District Court. In the opinion, the Court of Appeals determined that that referral of the proceeding by the District Court to the ICC was correct, and that the issue of the reasonableness of Maislin's billing practices was within the ICC's primary jurisdiction. Finding that nothing prohibits the ICC from changing its policy on enforcing the unreasonable practice provision of 49 U.S.C. §10701(a), the Court of Appeals concluded that the ICC's change in policy and consideration of equitable defenses was justified and consistent with its "practices" jurisdiction under the Interstate Commerce Act. The Court of Appeals also found that the ICC's consideration of equitable defenses was a reasonable attempt to harmonize the competing provisions of 49 U.S.C. §10701(a), which mandates that tariff rates and practices

be reasonable, with the provisions of 49 U.S.C. §10761(a), which mandates the collection of tariff rates. The Court of Appeals also disregarded Maislin's argument that the ICC's decision was merely an "advisory" decision, finding that the ICC had recognized that its responsibility was to evaluate the reasonableness of a practice, while the District Court retained the authority to structure a proper remedy. Lastly, the Court of Appeals determined that Maislin's claim for prejudgment interest was not required to be addressed, because Primary was not liable for the claimed undercharges.

Reasons for Denying Petition

The Court of Appeals committed no error in affirming the District Court's adoption of the ICC's decision determining that it would be an unreasonable practice pursuant to 49 U.S.C. §10701(a) to require Primary to pay the claimed undercharges representing the difference between the rates negotiated by the parties and the tariff rates. The ICC, in exercising its special competence, expertise, and administrative discretion, and acting within its primary jurisdiction, provided a reasoned and correct statutory construction of 49 U.S.C. §§10701(a) and 10761(a). The ICC's statutory construction also provided a reasonable accommodation between competing sections of the Interstate Commerce Act. The Court of Appeals did not commit error in finding that the District Court properly accorded substantial deference to the ICC's decision. Thus, the decision of the Court of Appeals is fully consistent with established federal law and further review is not warranted.

ARGUMENT

A. The decision of the Court of Appeals is fully consistent with established federal law and further review is not warranted.

1. The Court Of Appeals Correctly Found That Equitable Defenses Can Be Considered Pursuant To 49 U.S.C. §10701(a) To Determine The Reasonableness Of A Carrier's Billing Practices.

Maislin's primary argument in the Petition is that the Court of Appeals committed error by disregarding past precedents in affirming the District Court's acceptance of the ICC's determination that Primary is permitted to raise equitable defenses to claimed undercharges (Petition at 8-9; 11-12). The Court of Appeals thoroughly reviewed the precedents and the pertinent provisions of the Interstate Commerce Act ("ICA"), 49 U.S.C. §10101, *et seq.*, and correctly rejected the argument by concluding that the decision on referral demonstrated the ICC's continuing evolution of its view on the relevance of negotiated rates in determining the reasonableness of a motor carrier's billing practices under 49 U.S.C. §10701(a).

The traditional view had been that ignorance or misquotation of rates generally was not an excuse for paying less than the tariff rates. *See, e.g., Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494 (1915). However, in recent years the ICC has reexamined the issue. In *Buckeye Cellulose Corp. v. Louisville & Nashville R.R. Co.*, 1 I.C.C.2d 767 (1985), *aff'd sub nom., Seaboard System R.R. Co. v. United States*, 794 F.2d 635 (11th Cir. 1986), the Eleventh Circuit affirmed the ICC's decision to order the waiver of undercharges pursuant to 49 U.S.C. §§10701(a) and 10704(a)(1) based on a rail carrier's rate misquotations. The case arose from a

proceeding before the ICC where the shipper contended that the railroad intentionally misquoted a rate to the shipper, and that the attempt by the railroad to collect resultant undercharges from the shipper was an unreasonable practice. The ICC specifically found that the shipper did not pay the applicable tariff rate, but determined that under the circumstances presented the collection of undercharges in itself was an unreasonable practice. The ICC also reversed its prior position that the equitable defense of a carrier rate misquotation was not a defense to a claim for undercharges by a carrier. The Eleventh Circuit found that the ICC was "... both justified and within its jurisdiction", and that "[n]othing prohibits the ICC from changing its policy on enforcing the 'unreasonable practice' provision of section 10701(a)". *Id.* at 638.

Subsequently, the ICC in its decision in the rulemaking proceeding at *National Industrial Transportation League—Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ("Negotiated Rates"), adopted a policy statement providing that the filed rate doctrine does not necessarily bar the consideration by the ICC of equitable defenses against claims for undercharges. The ICC noted in the decision that the passage of the Motor Carrier Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793, July 1, 1980, had "dramatically altered the competitive atmosphere of the motor carrier industry", resulted in "intense, new competition," and required "carriers to price competitively and on extremely short notice" in order to retain or obtain new traffic. *Id.* at 105. As a result, the ICC found that shippers are required to daily negotiate "hundreds, or even thousands" of individual rates, and it is "extremely difficult for shippers to

determine, prior to movement, whether the agreed rate is actually on file". *Id.* at 105. The issue, as summarized by the ICC, was:

... whether a shipper must pay the rate established in a tariff where a motor common carrier has negotiated a lower rate and has indicated that the negotiated rate would be the one charged (and therefore presumably filed as a tariff). [Footnote omitted] We believe, in the highly competitive motor carrier industry and economy in general, equitable defenses to rigid application of filed tariff rates should be available on a case-by-case basis and that our unreasonable practice jurisdiction authorizes such an approach. *Id.* at 105-06.

Concluding that permitting equitable defenses comports with the spirit of the MCA, the ICC stated that upon referral from a court it would decide whether, under all "relevant circumstances", the collection of undercharges would be an unreasonable practice. *Id.* at 107.¹

The Court of Appeals, citing the *Seaboard System* and *Negotiated Rates* decisions with approval, properly concluded that nothing prohibits the ICC from changing its policy on enforcing the unreasonable practice provision of 49 U.S.C. 10701(a), and that changed circumstances warranted reexamination by the ICC of its previous policy of refusing to consider equitable

¹ The ICC's later decision in *National Industrial Transportation League—Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (served June 29, 1989), supplemented the earlier decision and reiterated that the rate filing requirements under 49 U.S.C. §10761(a) remain in effect but also held that the assessment of such rates may be found to be an unreasonable practice under appropriate circumstances. *Id.* at 627, 631.

defenses.² These findings by the Court of Appeals are fully supported by past precedents, and should not be disturbed by this Court.

Maislin further argues in the Petition that *Louisville & Nashville R.R. Co. v. Maxwell, supra* and *Square D. Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 106 S.Ct. 1922 (1986), reaffirmed the validity of the filed rate doctrine by prohibiting any deviation from the terms of a filed tariff (Petition at 8, 12, 21). The Court of Appeals considered this argument and properly found that Maislin's reliance on those decisions was untenable.

... In *Square D v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), the Supreme Court held that shippers could not use antitrust law to challenge the legality of tariff rates filed with the ICC, even where the carrier conspired to fix rates in violation of the Sherman Act, because the rates had been approved by the ICC. *Id.* at 416-17. In *Maxwell*, the Supreme Court held that the lawfully filed rate of the carrier must be charged by the carrier and paid by the shipper, and that a shipper is not excused from paying the full amount of the filed tariff. In both *Square D* and *Maxwell*, however, the rates enforced by the Court were presumptively reasonable because they had been approved by the ICC. Therefore, collection of those rates was mandated by law. Neither case concerned rates or practices deemed to be unreasonable by the ICC. The "courts have never held that the Commission lacks authority to prohibit

² In *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989), a case involving a similar factual situation and argued before the Eighth Circuit on the same day as this proceeding, the District Court had referred the proceeding to the ICC, but citing the filed rate doctrine refused to affirm the ICC's decision. The Court of Appeals, relying on the decision in this proceeding, reversed the District Court and held that the reasonableness of the carrier's billing practices was within the primary jurisdiction of the ICC, and that the District Court should have deferred to the ICC's decision. *Id.* at 548.

the unreasonable collection of undercharges" under section 10701. *Seaboard*, 794 F.2d at 638 (emphasis added) (Petition, Appendix A at 9a).

Maislin cites two cases decided by the United States Court of Appeals for the Eighth Circuit, *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (8th Cir. 1986) and *Missouri Pacific R.R. Co. v. Rutledge Oil Co.*, 669 F.2d 557 (1982), in support of its contention that the filed rate doctrine prohibits the consideration of equitable defenses (Petition at 8). Both cases are inapposite, because neither case involved a situation where the shipper sought to defend a carrier undercharge action by having the case referred to the ICC to determine whether the carrier's practices were reasonable. *Paulson* involved a shipper which sued a motor carrier for the failure to timely deliver an express package. *Missouri Pacific* involved the application of an estoppel defense to the collection of demurrage charges. In neither case did the Eighth Circuit address in any manner the ICC's authority pursuant to 49 U.S.C. §10701(a) to determine the reasonableness of a motor carrier's practices.

Maislin also argues in the Petition that the Court of Appeals decision "squarely conflicts" with the decision of the United States Court of Appeals for the Fifth Circuit in *Matter of Caravan Refrigerated Express, Inc.*, 864 F.2d 388 (5th Cir. 1989), rehearing denied March 1, 1989, petition for writ of certiorari pending in No. 88-1958, *sub nom. Supreme Beef Processors, Inc. v. Yaquinto* (Petition at 8-9). In that decision, the Fifth Circuit held that under the filed rate doctrine, a motor carrier which had negotiated a rate with a shipper for less than the tariff rate, could collect undercharges. However, unlike this proceeding, the *Caravan Refrigerated* decision did not involve a referral under the

primary jurisdiction doctrine to the ICC and the subsequent consideration of the ICC's decision following the referral.

The finding by the Court of Appeals in this proceeding that equitable defenses can be considered pursuant to 49 U.S.C. §10701(a) to determine the reasonableness of a motor carrier's billing practices is fully consistent with precedent and comports with the pertinent provisions of the ICA and, therefore, no further review is warranted.

2. The Determination Of The Reasonableness Of Maislin's Billing Practices Under 49 U.S.C. §10701(a) Is Within The ICC's Primary Jurisdiction.

In the Petition, Maislin contends that the Court of Appeals committed error in finding that the issue of the reasonableness of Maislin's billing practices before the District Court was an issue properly within the ICC's primary jurisdiction. Maislin further contends that this issue is a question of law and within the competence of the judiciary (Petition at 8-10). Both contentions are without merit.

The conclusion of the Court of Appeals, that under the doctrine of primary jurisdiction the reasonableness of Maislin's billing practices were properly determined by the ICC, is fully supported by precedent. This Court has considered the application of the doctrine of primary jurisdiction on various occasions and determined that it should be exercised by the courts if the issues in the proceeding "turn on a determination of the reasonableness of a challenged practice," or raise a "question of the validity of a rate or practice." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304-306, 96 S.Ct. 1978, 1987-88 (1976). The doctrine should also be exercised over any matter that "... raises issues of transportation policy which ought to be considered by

the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the ICA]." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 65, 77 S.Ct. 161, 166 (1956). See also *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 431-32, 60 S.Ct. 325, 329 (1940).

The lower courts have also made clear that the issue of the reasonableness of practices sought to be applied by a carrier in its tariff should be referred in the first instance to the ICC for initial determination. As specifically noted by the Eleventh Circuit in *Seaboard System R.R., Inc. v. United States*, 794 F.2d at 638, "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." See also *Carriers Traffic Serv. v. Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989); *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989); *Western Transp. Co. v. Wilson & Co., Inc.*, 682 F.2d 1227 (7th Cir. 1982); *Iowa Beef Processors v. Ill. Central Gulf R. Co.*, 685 F.2d 255 (8th Cir. 1982). Lastly, as found by the Court of Appeals, the "majority of the lower federal courts presented with similar claims for undercharges have referred the issue to the ICC." (Petition, Appendix A at 6a).

The District Court's referral of the issue of the reasonableness of Maislin's billing practices to the ICC has been the traditional method utilized by courts for the determination of reasonableness issues arising under 49 U.S.C. 10701(a). Such issues are complicated matters which Congress entrusted to the ICC, and which the courts have long recognized to be properly determined by the ICC's special competence and expertise. *United States v. Western Pacific R.R. Co.*, 352 U.S. at 63-64, 77 S.Ct. at 164-65. The recognition by the Court of Appeals that the decision of whether to permit Maislin

to collect undercharges directly involved the reasonableness of its billing practices, and the Court of Appeals affirmance of the District Court's holding that the ICC had primary jurisdiction to determine the reasonableness of Maislin's billing practices, are fully supported by precedent and do not require review by this Court.

3. The ICC's Decision Is A Reasonable Accommodation Between Competing Sections Of The Interstate Commerce Act.

The essence of Maislin's argument in the Petition is that the filed rate doctrine requires the application of the provisions of 49 U.S.C. §10761(a) in a mechanical and slavish manner despite the fact that a carrier may have engaged in an unreasonable practice (Petition at 11-12, 13). By characterizing the dispute in this proceeding as only involving rate reasonableness, and refusing to recognize that the Court of Appeals, the District Court, and the ICC have all properly recognized that the dispute involves the issue of the reasonableness of Maislin's billing practices, Maislin incorrectly argues that the enforcement of the unreasonable practices doctrine must always be subordinated to the enforcement of the filed rate doctrine.

The filed rate doctrine embodied in 49 U.S.C. §10761(a), and the unreasonable practices doctrine embodied in 49 U.S.C. §10701(a), are both mandated by the ICA. Each of these statutory sections control in appropriate circumstances, and when the sections conflict the ICC is the proper forum for the resolution of such a dispute. The Court of Appeals squarely addressed this issue, finding that "[s]ection 10761(a), which mandates the collection of tariff rates, is only part of an overall regulatory scheme administered by the ICC, and there is no provision in the Interstate Commerce Act

elevating this section over section 10701, which requires that tariff rates be reasonable." (Petition, Appendix A at 9a). See also *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d at 548. In the event of a dispute as to the application of the two statutory sections, the proper authority to harmonize these competing provisions is the ICC. *Seaboard System R.R. Co. v. United States*, 794 F.2d at 638. Under this approach, the ICC is exercising its authority to consider all the circumstances, including equitable defenses, to determine the reasonableness of the billing practices under 49 U.S.C. §10701(a), but it is not abolishing the requirement in 49 U.S.C. §10761(a) that a carrier must charge the tariff rate. *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d at 548; *Negotiated Rates*, 3 I.C.C.2d at 103.

The Court of Appeals properly determined that the ICC decision "represents a reasonable accommodation of conflicting policies that were committed to its administration by the Interstate Commerce Act." (Petition, Appendix A at 12a). To find otherwise would have improperly granted validity to Maislin's attempt to give no effect, and in essence to write out of the ICA, the unreasonable practices doctrine embodied in 49 U.S.C. §10701(a).

4. The Statutory Provisions Of The Interstate Commerce Act Permit The ICC's Consideration Of The Unreasonable Practices Provision Of 49 U.S.C. §10701(a).

Maislin argues in its Petition that the ICC does not have the authority to change its policy concerning the filed rate doctrine because the MCA contained no specific statutory provisions authorizing such a change (Petition at 21-23). This argument is without merit.

It is well-settled that the ICC may alter its past interpretation, and if the ICC in resolving an issue departs from its settled precedent, it must adequately explain its change in policy. *See, e.g., Seaboard System R.R. Co. v. United States*, 794 F.2d at 639; *Intercity Transp. Co. v. United States*, 737 F.2d 103, 108 (D.C. Cir. 1984). A court must accept such a change if the ICC's new interpretation is reasonable. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844-45, 104 S.Ct. 2778, 2782 (1984). As stated by this Court in *American Trucking Ass'n, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618 (1967):

...the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice
... Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.

See also Western Coal Traffic League v. United States, 719 F.2d 772 (5th Cir. 1983) (*en banc*), cert. denied, 466 U.S. 953, 104 S.Ct. 2160 (1984).

Based on the "relaxed regulatory requirements" in the MCA, and the ICC's determination that the enforcement of the unreasonable practices provision of 49 U.S.C. §10701(a) would not undermine the anti-discrimination goals of the filed rate doctrine, the Court of Appeals properly concluded that the ICC's new interpretation permitting the assertion of equitable defenses was reasonable (Petition, Appendix A at 11a).

Citing *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 71 S.Ct. 692 (1951) and *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 79 S.Ct. 904 (1959), Maislin states that those decisions left purchasers of motor common carriage without any remedy whatsoever with respect to unreasonable rates on past shipments. Maislin then argues that the statutory remedy created by Congress with the enactment of Pub. L. 89-170, 79 Stat. 651, September 6, 1965, only provided a reparations remedy for unreasonable rates, and did not provide a cause of action or defense for an unreasonable carrier practice (Petition at 13-20).

As is apparent from this Court's decision in *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 83 S.Ct. 157 (1962), Maislin's argument is without merit. In *Hewitt-Robins*, a shipper brought an action against a carrier and asserted that the carrier's practice of billing the shipper at a higher interstate rate rather than at a lower intrastate was unreasonable. In reversing the Court of Appeals, this Court held that the prior decision in *T.I.M.E.* was not controlling and confirmed that a shipper may assert the statutory unreasonableness of past motor carrier practices in court proceedings, and then obtain referral of such issues to the ICC for substantive determination. *Id.* at 85, 83 S.Ct. at 158. This Court also noted that similar assertions of the past unreasonableness of motor carrier rates were not permitted under *T.I.M.E.* and the then existing law.

In 1965, Congress reversed the prohibition pertaining to rate unreasonableness, by amending the ICA. Pub. L. 89-170, 79 Stat. 651, September 6, 1965 (amending then 49 U.S.C. §304(a)). By this action, Congress restored the existence of parallel remedies in post-shipment damage litigation involving either unreasonable rates or unreasonable practices which had existed prior to *T.I.M.E.* and *Hewitt-Robins*. When the ICA was recodified in 1978, Pub. L. 95-473, 92 Stat. 1337, October 17, 1978, unitary provisions were created to continue post-shipment damage remedies applying to both unreasonable rates and unreasonable practices. See 49 U.S.C. §§10701(a), 10704(b)(1), 11705(b)(3), 11705(c)(1) and 11706(c)(2). This combination of prior separate provisions in the recodification merely corrected variances and inconsistencies in the use of synonymous terms in the prior statute. See Historical Revision Notes, following 49 U.S.C. §10101, 49 USCA Transportation [partial revision], 1989 Pamphlet, at 97-98. See also *Purulator Courier Corp. v. I.C.C.*, 598 F.2d 225, 227, n.5 (D.C. Cir. 1979) (enactment of the recodified ICA was not intended to make substantive changes to the original ICA, but the new language may serve as a guide to the meaning of the original ICA). Thus, the referral procedures are identical whether a shipper in a court proceeding pleads a defense of unreasonable rates or unreasonable practices.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition For Writ Of Certiorari be denied in its entirety.

Respectfully submitted,

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